IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 856 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

KANAIYAALAL BHIMJIBHAI JAVIYA UMIYA KIRANA STORES AMRELI

Appearance:

1. Criminal Appeal No. 856 of 1991

MR KC SHAH, APP for Petitioner No. 1

MR YOGESH S LAKHANI for Respondent No. 1

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 03/08/2001

ORAL JUDGEMENT

1. The State of Gujarat has preferred this appeal challenging the judgment and order of acquittal passed by the learned Chief Judicial Magistrate, Amreli in favour of the respondent in Criminal Case No. 94/1988 dated

26/8/1991.

2. Respondent herein has been prosecuted for the offences under Sections 7 and 16 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as 'the Act'). Accordingly the complainant Shri R.A. Mundhava, Food Inspector, attached to the office of the Superintendent of Drugs and Food at Amreli, he was appointed as Food Inspector vide notification issued by the Government of Gujarat at Exh. 19 and he was authorised by the Assistant Commissioner, Food and Drugs Regulation Department to lodge complaints in the Court in connection with adulteration of food articles.

On 4/2/1987 he visited the shop of respondent Kanaiyalal Bhimaji Javia. At that time the owner of the shop, namely respondent was present at the shop. The Food Inspector gave his identity and also expressed his intention to collect samples of food and for that he passed on an intimation in Form 6 prescribed under Rule 15 of the Prevention of Food Adulteration Rules (hereinafter referred to as 'the PFA Rules'). He had kept the Panchas present at the time of his visit to the respondent's shop. He asked respondent to sell the sample of turmeric powder kept in a tin for sale in the shop. Therefore, respondent sold 450 grms. of turmeric powder to Food Inspector and the price of the same was paid by the Food Inspector. The Food Inspector intimated respondent that he had purchased the food article for getting it analysed by the Public Analyst. The cash memo showing the purchase of the said article was produced by the Food Inspector. During the trial the same has been exhibited at Exh. 21. According to the prosecution, the Food Inspector thereafter brought out 3 clean moistureless, dry, colourless and transparent glass bottles and filled 150 grms. of turmeric powder in each bottle. The bottles were fastened by air tight wooden cork. He thereafter applied his seal bearing English letters FI No. 10 and he also thereafter got prepared the labels duly signed by him and also the Panchas and the vendor and pasted them with gum on the middle portion of all the three bottles. He also pasted paper slips bearing the seal impression and signature and Code No. 10/FDA/JMD/ AMR/1/LHA/9/87 covering the bottle from the top of the cork and rounding it from the bottom portion of the bottle again bringing it to the top of the bottle. Similarly the bottles were rounded with string (twine) and the notes were tied at the top of the bottles. On the paper slips signatures of the Panchas and the vendor respondent were obtained. Necessary Panchnama was also drawn simultaneously. The Food Inspector thereafter

despatched one sample with Form No. 7 in accordance with the rules prescribed under the PFA Rules and also despatched copy of the seal impression separately to the Public Analyst, Kutch at Bhuj. The Public Analyst, upon analysis submitted his report which has been produced on record at Exh. 29. It was found that the sample contained non-permitted oil seluable coal tar dye, which was prohibited for being used in food articles. Hence, the Food Inspector submitted all the relevant papers alongwith the report of the Public Analyst at Exh. 29 to the Local Health Authority for obtaining the requisite consent u/S. 20 of the Act to prosecute the respondent. The Local Health Authority vide consent dated 1/5/1987 permitted the Food Inspector to lodge prosecution against the respondent in the Court of law. On receipt of the consent, the complainant Food Inspector on 13/1/1988 lodged the complaint at Exh. 1 against the respondent in the Court of the Ld. Chief Judicial Magistrate at Amreli. A notice was thereafter served on respondent u/S. 13 (2) of the Act by the Assistant Commissioner, Local Health Authority, Junagadh with an intimation that if the respondent wished he could get the sample analysed again by making application to the concerned Court within 10 days of the receipt of the notice. The respondent made an application to the concerned Court for getting the sample analysed by the Director of Central Food Laboratory (hereinafter referred to as 'DCFL'). Hence, the Ld. Magistrate granted the said application and forwarded one sample of the offending article to the DCFL after complying with all requisite formalities prescribed under the Act and the Rules. The report of the DCFL was received and it was found that in the opinion of the DCFL the sample showed admixtured with edible common salt in violation of rule 44 (a) of the PFA Rules and the sample was thus adulterated.

3. At the trial, necessary charge at Exh.36 was framed against the respondent and he pleaded not guilty and claimed to be tried.

4. The prosecution examined Rupabhai Arjanbhai Mundhava as P.W. 1 at Exh. 18, Food Inspector and complainant of this case. He deposed that he was appointed as the Food Inspector vide notification at Exh. 19 and that he was duly authorised by the competent authority to lodge prosecution in cases of adulteration of food. He visited shop on 4/2/1987 and purchased the sample of turmeric powder for getting it analysed by the Public Analyst. He in detail prescribed how the sample was purchased and collected in the bottle and how the containers were sealed and despatched to the Public

Analyst as well as to the Local health Authority. Since there is no dispute on this issue, I do not in detail describe the manner in which the samples were collected, sealed and despatched to the Public Analyst and the Local Health Authority by the complainant. However, the complainant's say that he collected the sample in dry, moistureless, transparent and colourless glass bottle has been challenged in the cross-examination. I reproduce the same in detail hereunder. The complainant has said in evidence that when he purchased the sample of turmeric powder he divided into three equal parts of 150 grms and he thereafter filled each portion of 150 grms. in a separate clean, moistureless and colourless and transparent glass bottles which were tightly fastened with wooden cork. The Food Inspector has further deposed that he had received the report of the Public Analyst which showed that the sample of turmeric powder contained non-permitted oil seluble coal tar dry. In the cross-examination this witness has stated that he had taken training for 45 days. In the further cross-examination, after framing of the charge, this witness was put questions with regard to the notification appointing him as Food Inspector and the collection of the sample of the turmeric powder from the shop and filling them in three separate bottles. The Food Inspector has admitted that he had weighed the turmeric powder in a scale lying in the shop. He has further admitted that in the said shop respondent sold salt as well as other grocery items. He has further stated that on the day on which the offending sample was collected, he had only three bottles with him. He has further stated that there is register maintained in the office indicating the time at which the bottles were brought in the office. These bottles were kept in the cupboard and the bottles are being allotted to the Food Inspector. He has further stated that it was quite possible that the bottles would lie for a long time with them. He has admitted that he would not be able to say as to when the bottles were cleaned last. He has further admitted that the bottles were normally being cleaned by detergent powder. He has, however, stated that he did not know whether the detergent powder contained salt.

The prosecution has also examined Keshubhai Valjibhai as P.W. 2 at Exh. 65, who has turned hostile and not supported the prosecution.

5. The Ld. Magistrate at the end of the trial held vide his judgment dated 26/8/1991 respondent not guilty of the offence with which he was charged as according to the Ld. magistrate the consent granted by the Local

Health Authority u/S. 20 of the Act did not contain any reasons for which it was granted and hence it was bad in law in the light of the judgment delivered by the Hon'ble Mr. Justice Bhairavia, which has been reported in the case of Ramanbhai Shivabhai v/s. The State of Gujarat reported in 32 G.L.R. at page 82. The Ld. Magistrate has dealt with other contentions raised by the prosecution as well as the defence and he has held that the sample was collected and despatched for analysis in accordance with the PFA Rules and the Ld. Magistrate also found that while despatching the sample to the DCFL, he had properly followed the rules prescribed for the same. In other words, the Ld. Magistrate acquitted the respondents only on the ground of defective consent.

6. Mr. K.C. Shah, Ld. APP appearing on behalf of the State contended that the Ld. Magistrate has committed grave error in relying upon the aforesaid judgment of this Court as the same stands overruled in light of the subsequent judgments of this Hon'ble Court as well as Hon'ble Supreme Court. He has also brought to my notice the consent granted by the Local Health Authority, which is on record at Exh. 32 and drew my attention to the last portion thereof and submitted that the said portion clearly indicated that the Local Health Authority had applied its mind while granting consent. He has relied on the decision of this Court in the case of Gangadhar Y. Ramekar v. M.B. Shah reported in 1999 (2) G.L.R. at page 1105. The observations made in para. 9 are reproduced hereunder :-

"Considering the question of consent, as envisaged under Sec. 20 of the Act, the consent is produced at Ex. 48 on record of the trial Court. There is a specific averment that the consent was given after going through Analysis Report of the Public Analyst and other pertinent papers and documents, and the nature of the offence committed by the alleged offenders. It, therefore, cannot be said that the consent was given without application of mind. If the decision of the Hon'ble Supreme Court in the case of Suresh S. Rajput v. Bhartiben P. Soni 1996 (7) SCC 199 is seen, the same question was involved. In that case, the Hon'ble Supreme Court has reproduced the text of the consent letter in paragraph 6. If that is read in comparison to Ex. 48, it can be found that it is ad verbatim the same, except the name of the accused. In spite of the said consent letter, it has been observed that the said sanction was in accordance with

law, although it was a cyclostyled one and, therefore, that question is now set at rest by the said decision and it is, therefore, hereby held that the verdict of the learned Magistrate that the sanction was not valid was an error."

7. Looking to the consent at Exh. 32 it is clear that this decision would apply to the present case with full force and, therefore, I do not have any hesitation to hold that the Ld. Magistrate has committed error in holding that the consent was bad in law and prosecution could not succeed on the strength of such invalid consent.

8. Ms. Archana Amin, learned advocate appearing with Mr. Y.S. Lakhani for the respondent, however contended before me that the evidence of Food Inspector clearly showed that the bottles in which the sample was cllected were cleaned by whom and when and therefore, it cannot be said for sure that the said bottles were clean, dry and moistureless and to that extent there was violation of mandatory Rules prescribed for collecting, packing and sealing such bottles. She drew my attention to the portion of evidence of Food Inspector pertaining to collection of sample in bottles which has been reproduced by me earlier, in para. 4 of this judgment.

9. On going through the evidence, I find that on the question of cleanliness of the bottles the evidence of prosecution is not satisfactory. The Food Inspector though in his examination-in-chief stated that he had collected the sample in dry, clean, colourless and transparent glass bottles, in the cross-examination he has admitted that it was true that the bottles were lying in the office for long time and that he did not know when they had been cleaned and who had cleaned them. He has further admitted that normally the bottles are being cleaned by detergent powder. He, however, showed his ignorance that the detergent powder contained salt. Now it is a well settled principle of law that the prosecution has to prove beyond any reasonable doubt that the container in which the sample was filled in and despatched for analysis should be clean, moistureless, dry and of transparent glass. In this case, as seen above, the Food Inspector has not stated that the bottles were cleaned by him or the same were cleaned in his presence by some one else. The prosecution has not examined the person who had cleaned the bottles nor there is any evidence on record to show as to when they were cleaned last. The Food Inspector has stated that he was

not in a position to say when the bottles were cleaned last. It has also come in his evidence that the bottles were lying since long in the office. In these circumstances, it can be easily said that the prosecution has not been able to satisfactorily prove on record the compliance of mandatory requirement in respect of the nature of container. In the aforesaid decision rendered by this Court in the case of Gangadhar Ramekar (supra) is referred to, in para. 12.1 it has been observed as under :-

> "In this regard, it may be noted that the evidence of the complainant, at Ex. 31, if perused, indicates that he had no personal knowledge about the cleaning of bottles in which the samples were taken. He did not have any information or knowledge as to who cleaned those bottles and when. It would, therefore, be a matter of doubt whether the bottles were really cleaned or not. When the bottles were shown to the Panch witness, it transpires from the evidence that the cork was closed and, therefore, in light of the decision of this High Court in the case of Sudhirchandra B. Joshi v. Arvindkumar Naranbhai Patel & Ors., Criminal Appeal No. 1013 of 1988, delivered on 12th July, 1995, the requirements of Rule 14 cannot be said to have been complied with. In the said decision, it was observed that the person who cleaned the bottles was not examined and there was satisfactory evidence to show that the mandatory requirements were not complied with and, therefore, the benefit was given to the accused persons relying upon the decision of this High Court in the case of M.B. Risaldar v. Radheshyam as reported in 1980 (2) GLR 136. The facts of the present case are identical as can be seen from the deposition of the complainant."

The aforesaid observations have been made one of the grounds of the acquittal. In view of this, I am inclined to accept the contention of Ms. Archana Amin. No other contentions have been raised by either side.

10. Since the prosecution has failed to comply with the aforesaid mandatory requirements with regard to collection of sample in proper container, the accused respondent should get benefit thereof. Since this is an appeal against order of acquittal, I can consider the evidence on record afresh and reach to my own conclusion. In my opinion, this appeal, therefore, fails because of

the failure on the part of the prosecution to comply with the mandatory requirements as stated above. The appeal is, therefore, ordered to be dismissed.

[Akshay H. Mehta, J.]

* Pansala.